IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 1342 of 1999

For Approval and Signature:

HONOURABLE MR.JUSTICE A.L.DAVE
HONOURABLE MR.JUSTICE BANKIM.N.MEHTA

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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RAJUBHAI VISHRAMBHAI VAGHARI - Appellant(s)
Versus
STATE OF GUJARAT - Opponent(s)

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Appearance :
1,MR BS SUPEHIA for Appellant(s) : 1,
2. MRS FALGUNI PATEL APP for Opponent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE A.L.DAVE

and

HONOURABLE MR.JUSTICE BANKIM.N.MEHTA

Date : 19/03/2007

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE BANKIM.N.MEHTA)

1. The accused Rajubhai Vishrambhai Vaghari has preferred this appeal under Section 374 (2) of the Code of Criminal Procedure, 1973 and challenged the judgment and order dated 1-12-1999 passed by the learned Addl. Sessions Judge, Vadodara in Sessions Case No. 91 of 1999, convicting him for the offence punishable under Section 302 of the I.P. Code and sentencing him to undergo life imprisonment and to pay fine of Rs.250/- in default, to undergo simple imprisonment for 7 days and also convicting him for the offence punishable u/s 392 of the I.P. Code and sentencing him to undergo rigorous imprisonment of 5 years and to pay fine of Rs.250/- and in default, to undergo simple imprisonment of seven days. The both the sentences are ordered to run concurrently.

2. In brief, the prosecution case was that deceased Bhikhabhai Rameshbhai was the son of the informant Rameshbhai Dhulabhai Vaghari and they were staying at village Mandva Taluka Dabhoi, District Vadodara. On 21-5-1998 in the morning at about 8-00 O'clock deceased Bhikhabhai went in the sim of village Fulwadi for grazing cattle. Bhikhabhai used to return home by noon. But on that day he did not return home upto 5-00 p.m. Rajubhai Udhabhai Vasava, Kalidas Dalsukh and Narpatsinh Bhikhabhai who had gone

for grazing cattle had returned home. Kalidas came to the house of informant Rameshbhai and informed him that before about 10-00 a.m. Bhikhabhai and accused who were grazing cattle told them that they were going to have water from the well and started to go to well, The accused was having an axe and Bhikhabhai was having a stick. After going to have water they did not return and the cattle is left in the sim of village. On receiving this information Rameshbhai went to the sim of Fulwadi village and took his cattle home and went to the house of Narpat Bhikha and Chaka Gala who had gone to the sim of the village to graze cattle with his son Bhikhabhai. On inquiry, those boys also informed him that Bhikhabhai went with the accused to have water and thereafter did not return. Thereafter, Rameshbhai went to his aunt Shanta who happened to be the mother of the accused to make inquiry. On inquiry, the mother of the accused informed him that the accused has gone to his in-laws' house at Khumpiya village. She also informed him that Bhikhabhai might have gone with him. Therefore, the informant did not make further inquiry. On 22-5-1998 Rameshbhai went to the sim of the village to graze cattle at about 10-00 O'clock at that time one Raju Uda and another boy Bhango came to him and informed that dead body is

lying in the field of Rajubhai. Therefore, Rameshbhai with one Ramsing Hirabhai Rabari went to the field of Rajubhai and found the dead body of Bhikhabhai with injuries. Thereafter Rameshbhai went to Dabhoi Police Station and lodged first information report with regard to incident.

3. On the basis of the information given by Rameshbhai Dhulabhai before Dabhoi Police Station offence was registered as I. CR No. 151 of 1998 for the offence punishable u/s 302 and investigation was started. During the course of the investigation, inquest panchanama, panchanama of scene of offence and panchanama of discovery of muddamal axe were drawn and dead body of Bhikhabhai was sent for postmortem and statement of the witnesses were recorded. The accused was arrested.

4. On completion of the investigation, charge sheet was laid before the Court of learned Judicial Magistrate, First Class Dabhoi for the offence punishable u/s 302 and 392 of the I.P. Code. As the offence was exclusively triable by the Court of Sessions, the case was committed to the Sessions Court, Vadodara and it was registered as Sessions Case No. 91 of 1999. The learned Addl. Sessions Judge, Vadodara

framed charge Exh. 4 against the accused for the offences punishable under section 302 and 392 of the I.P. Code and the same was read over and explained to the accused who pleaded not guilty to the charge and claimed to be tried. Therefore, the prosecution adduced evidence to prove the charge levelled against the accused. On completion of recording of evidence by prosecution the learned trial Judge explained to the accused the incriminating circumstances appearing against the accused in the evidence. The appellant explained the incriminating circumstances in his further statement recorded u/s 313 of the Code of Criminal Procedure, 1973 by stating that on the previous day of the incident he had gone to attend marriage of his sister-in-law; that false complaint is filed against him; that the police has taken disadvantage of his absence and foisted false case.

5. After hearing the learned A.P.P. for the State and the learned advocate for the accused, the learned trial Judge found that the prosecution proved the case beyond reasonable doubt, and therefore, convicted the accused for the offence charged against him and sentenced him to undergo the sentences as mentioned hereinabove. Being aggrieved and

dissatisfied by the impugned judgment, the accused has preferred the present appeal.

6. We have heard the learned advocate Mr. S.B. Supehia for the appellant and Mrs. Falguni Patel, learned A.P.P. for the State at length and in great detail. We have perused the judgment of the trial court as well as the record and proceedings of the case.

7. Learned advocate Mr. Supehia for the appellant submitted that there is no eye witness to the incident and the prosecution case mainly rests on the circumstantial evidence. The witnesses who have seen the deceased last in the company of the appellant have not supported the prosecution case and therefore their evidence cannot be relied on. Hence the learned trial Judge has committed error in relying on their evidence. He also submitted that the dead body of the deceased was found after three days and the panchas have not supported the prosecution case with regard to discovery of the muddamal articles. He further submitted that the appellant was in other village at the time of the incident and was not present in the village and therefore the appellant is required to be acquitted of the offence charged against him by giving benefit of doubt and the appeal is

required to be allowed.

8. While opposing the appeal, the learned A.P.P. Mrs. Falguni Patel submitted that the prosecution proved the charge by unbroken chain of circumstances. The witnesses had seen the deceased last in the company of the appellant. She also submitted that the appellant raised plea of alibi. However, he has failed to discharge his burden. The evidence clearly proves the case beyond reasonable doubt and therefore the learned trial Judge was justified in convicting the appellant. She also submitted that the ornaments recovered from appellant belonged to the deceased and the appellant has not offered any explanation for the same. Therefore, the learned trial Judge was justified in convicting the appellant and no interference is warranted in the impugned judgment.

9. Learned advocate Mr. Supehia for the appellant has not disputed the fact that death of Bhikhabhai was homicidal. The prosecution examined P.W. 16 Dr. Mukeshkumar K. Brahmabhatt at Exh. 28 who performed postmortem of dead body of Bhikhubhai. According to the witness, the external injuries found on the dead body were recorded in postmortem report Exh. 29 and the

injuries were sufficient in the ordinary course of nature to cause death. According to the witness, external injuries Nos. 1, 2 and 4 were possible by sharp edged weapon like muddamal axe and the cause of death was haemorrhage leading to shock due to the injuries on the neck (right side) and head. The prosecution produced postmortem report at Exh. 29. It indicates the injuries found on the dead body and the cause of death. In view of this, the prosecution proved beyond reasonable doubt that death of Bhikhabhai was homicidal in nature.

10. The prosecution examined P.W. 8 Rajubhai Udhabhai Vasava at Exh. 18 who along with Kalidas @ Kaliyo Dalsukh Rabari went to graze cattle in the sim of village. The witness was aged about seven years and therefore before recording his evidence the learned trial Judge ascertained from him that the witness is capable of understanding the sanctity of oath. The evidence of this witness indicates that he and P.W. 9 Kalidas @ Kaliyo went to the sim of village to graze cattle where deceased Bhikhabhai was also grazing his cattle. At that time, the appellant told Bhikhabhai to accompany him to drink water. Thereafter, both of them went to drink water but did not return. The witness also deposed that he had seen Bhikhabhai last in company of the appellant and the appellant had

axe in his hand. In view of this evidence, it transpires that the witness, one Kalidas @ Kaliyo and deceased Bhikhabhai were grazing cattle and the appellant asked the deceased to accompany him to have water and both of them went to have water but thereafter neither deceased nor appellant returned. The witness returned home in the evening but the deceased did not return home in the evening and on inquiry by the father of the deceased, the witness informed him that deceased went with the appellant. The evidence of this witness also indicates that the appellant had axe in his hand.

11. The prosecution examined P.W. 9 Kalidas @ Kaliyo Dalsukhbhai Vaghari at Exh. 19 who went to graze cattle with appellant, deceased Bhikhabhai and Chako. The witness was aged about 13 years and therefore before recording his evidence the learned trial Judge ascertained from him that the witness is capable of understanding sanctity of oath. The evidence of this witness indicates that he along with appellant and victim went to graze cattle. At that time, the appellant took deceased with him on the pretext of having water. Thereafter, the deceased did not return but the witness returned home in the evening. On inquiry by the mother of the deceased, the witness informed her that

the appellant took the deceased with him to have water and since then the deceased has not returned. The evidence also indicates that when the deceased went with the appellant the deceased was wearing wrist-band ('kadu') and silver chain. The evidence of this witness also indicates that the appellant had axe in his hand and the witness identified half part of wrist-band.

12. The prosecution also examined P.W. 14 Kamlesh @ Chako Gopalbhai Tadvi at Exh. 25. The witness accompanied the deceased and others in the sim of village to graze cattle. The witness also deposed that the deceased was wearing wrist-band ('Kadu') and chain; that the appellant took the deceased with him to have water and thereafter they did not return. In view of this evidence it becomes clear that the witness along with others went to the sim of village to graze cattle where the appellant took the deceased with him on the pretext of having water and thereafter they did not return.

13. In view of the above evidence, it is clear that above three witnesses along with the deceased were grazing cattle and at that time the appellant took the deceased with him on the pretext of having water but thereafter they did not return. The evidence also indicates that the

deceased was wearing wrist-band ('kadu') and silver chain and the appellant was having an axe in his hand. In view of this evidence, it transpires that the witnesses saw the deceased last in the company of the appellant. The appellant has not given any explanation in respect of this circumstance. On the contrary, it is the defence of the appellant that on the previous day of the incident he left to attend the marriage of his sister-in-law. In support of his defence, the appellant has not adduced any evidence. In our view, the evidence clearly indicates that the deceased was last seen in the company of the appellant on the day of incident and thereafter dead body was found. Therefore, the defence that the appellant was not present in the village and had left for attending marriage of his sister-in-law, cannot be believed.

14. The prosecution examined informant P.W. 1 Rameshbhai Dhulabhai, the father of deceased Bhikhabhai, at Exh. 8. According to the witness, on the day of the incident, deceased Bhikhabhai with others went to the sim of village to graze cattle and the appellant also went there for grazing cattle. Thereafter, the appellant and the deceased went to have water at the well but the deceased did not return till evening. On inquiry, the witness was informed by P.W. 9

Kalidas and P.W. 14 Kamlesh @ Chako who had gone with the deceased to graze cattle that the deceased went with the appellant and did not return. The evidence also indicates that thereafter the witness inquired from the father and mother of the appellant who also happen to be his uncle and aunt and they informed him that the appellant must have gone to another village to attend marriage of his sister-in-law and the deceased must have accompanied him to attend the marriage. Therefore, the witness did not make any further inquiry about the deceased. Thereafter, on the next day, when the witness went to graze cattle, he was informed about the dead body lying in the field and so he went to the field and identified the dead body as of his son Bhikhabhai. The witness who identified the half part of wrist-band and chain belonging to deceased Bhikhabhai. It is true that the witness has no personal knowledge about the incident but from his evidence it becomes clear that his son Bhikhabhai went to graze cattle with P.W. 9 Kalidas and P.W. 14 Kamlesh @ Chako and when his son did not return in the evening he made inquiry with them who informed him that the deceased went with the appellant and did not return. Therefore the witness made inquiry with the parents of the appellant and as they showed a possibility as the appellant has gone to

another village in a marriage, the deceased might have accompanied him, the witness did not make further inquiry and thereafter he saw the dead body in the field with missing ornaments. The witness has identified the ornaments. This evidence clearly implicates the appellant in the offence as no satisfactory explanation is offered by the appellant.

15. The prosecution produced F.I.R. at Exh.9. The accusations made in the F.I.R. are supported by the witness in the oral deposition. In the F.I.R. it is alleged that Bhikhabhai went to graze cattle in the sim of village. Thereafter, he did not return and P.W.9 Kalidas informed him that the appellant took the deceased with him on the pretext of having water but they did not return. It is further alleged that the appellant had axe and on inquiry with the mother of the appellant she informed him that the appellant has gone to his in-law's house since yesterday and the deceased must have gone with him so the informant did not make further inquiry.

16. The prosecution examined P.W. 13 Revaben wife of Ramesh Dhula, the mother of deceased Bhikhabhai, at Exh. 24. The evidence of this witness indicates that on the day of the incident deceased Bhikhabhai went to graze cattle and

he was wearing wrist-band ('kadu') and chain and has identified he half part of wrist-band.

17. The prosecution produced panchanama of half part of wrist-band at Exh. 36 and examined P.W. 4 Andazkhan Husainkhan Pathan at Exh. 14 and P.W. 5 Jethabhai Lallubhai Thakor at Exh. 15, the panchas in whose presence half part of wrist-band was discovered. However, the panchas have turned hostile and have not supported the prosecution case. The prosecution also examined P.W. 12 Prafulkumar Kantilal Soni at Exh. 23, the goldsmith to whom the ornament was allegedly sold by the appellant. But he has also not supported the prosecution case. The panchanama is proved through the Investigating Officer P.W. 22 Umesh Motilal Joshi at Exh. 34. Therefore, there is no reason to disbelieve panchanama Exh. 36 in respect of discovery of the muddamal half part of wrist-band. The prosecution also produced arrest panchanama at Exh. 35 and examined P.W. 6 Rajendrabhai Khushalbhai Patanvadiya at Exh. 16 and P.W. 7 Sahebkhan Kajukhan Pathan at Exh. 17 in whose presence the arrest panchanama was drawn. However, these panchas have also turned hostile and have not supported the prosecution case. Therefore, the panchanama was also proved through the Investigating Officer. Panchanama Exh. 35 indicates that at the time of arrest of the

appellant, the muddamal chain was recovered from the appellant. The muddamal has been identified by P.W. 13 Revaben Exh. 24, the mother of the deceased. In view of this evidence, it becomes clear that chain belonging to the deceased was recovered from the appellant. The appellant has not offered any explanation with regard to this evidence.

18. The prosecution examined P.W. 18 Umesh Motilal Joshi at Exh. 34 who carried out the investigation of the offence. However, the defence has not been able to elicit that proper investigation has not been carried out.

19. In view of above, in our view, the learned trial Judge was justified in relying upon the evidence of P.W. 8 Rajubhai Udhabhai Vasava Exh. 18 and P.W.9 Kalidas @ Kaliyo Dalsukhbhai Exh. 19 who had seen the deceased last in the company of the appellant and thereafter the dead body was found. The appellant did not offer any explanation in respect of this incriminating evidence. The evidence indicates that on the day of incident the appellant took the deceased with him on the pretext of having water and thereafter the deceased did not return and on the next day his dead body was found. There is no evidence that the appellant left the village to attend marriage on the previous day of the

incident and was not present in the village on the day of the incident as is claimed. Therefore, the learned trial Judge was justified in convicting the appellant on the basis of this evidence for the offence punishable u/s 302 of the I.P. Code.

20. As far as the conviction of the appellant under Section 392 of the I.P. Code is concerned, P.W. 13 Revaben Exh. 24 identified the muddamal chain recovered from the appellant and half part of wrist-band. The witness also deposed that when the deceased went to graze cattle he was wearing these ornaments. The other witnesses who had also accompanied the deceased to graze cattle have also supported that the deceased was wearing these ornaments. The evidence indicates that the ornaments were missing when inquest panchanama Exh. 33 was drawn and the muddamal chain was recovered from the appellant at the time of his arrest. Therefore, the learned trial Judge was justified in recording the conviction of the appellant u/s 392 of the I.P. Code.

21. In view of above, the learned trial Judge was justified in recording the conviction of the appellant for the offences punishable u/s 302 and 392 of the I.P. Code and hence no interference is warranted in the impugned judgment. Under the circumstances, the appeal fails and deserves to

be rejected.

22. For the reasons recorded in the judgment, present Criminal Appeal fails and is dismissed. The conviction of present appellant Rajubhai Vishrambhai Vaghari recorded by the learned Addl. Sessions Judge, Vadodara by the judgment and order dated 01-12-1999 in Sessions Case No. 91 of 1999 for the offence punishable u/s 302 and 392 of the I.P. Code, is confirmed.

23. The muddamal be disposed of as directed by the trial court.

(A.L. Dave, J.)

(Bankim N. Mehta, J.)

/JVSatwara/